IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 10, 2007 Session

CYDNIE BROWNING O'ROURKE v. JAMES PATRICK O'ROURKE

Appeal from the Chancery Court for Williamson County
No. 27493 Russ Heldman, Chancellor

No. M2006-01071-COA-R3-CV - Filed on June 15, 2007

The trial court disqualified a law firm representing the wife in post-divorce proceedings. An attorney who had represented the husband joined the firm, which later began representing the wife. It was not disputed that the attorney who had represented the husband was disqualified from representing the wife. The trial court imputed this disqualification to the attorney's new firm. We affirm the trial court's order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Karla C. Hewitt, Nashville, Tennessee, for the appellant, Cydnie Browning O'Rourke.

Helen Sfikas Rogers, Nashville, Tennessee, for the appellee, James Patrick O'Rourke.

OPINION

While the O'Rourkes were divorced in April of 2001, there has been extensive post-divorce litigation between the parties. When Ms. O'Rourke's fifth attorney was allowed to withdraw in March of 2006, she retained Karla Hewitt. Ms. Hewitt filed a Notice of Appearance on March 31, 2006. Mr. O'Rourke's attorney, Helen Rogers, filed a Motion to Disqualify Ms. Hewitt on April 11, 2006. The trial court granted the motion, finding that Ms. Hewitt was disqualified from representing Ms. O'Rourke. Ms. O'Rourke appealed this finding of disqualification. Ms. Hewitt was allowed to represent Ms. O'Rourke on this appeal of the disqualification issue.

Ms. Hewitt practices law with Robin Barry. Beginning in October of 2005, they formed the two person firm "Hewitt & Barry, Attorneys" in association and not in partnership. They share office space, equipment, and letterhead.

Before joining Hewitt & Barry, Ms. Barry practiced law as the only full time associate in Ms. Rogers' firm from September 22, 2003 until October of 2005. During this period, Ms. Rogers represented Mr. O'Rourke in on-going post-divorce litigation with his former wife about the couple's minor children.

There was considerable confusion regarding the extent of Ms. Barry's involvement in Mr. O'Rourke's representation while she was with Ms. Rogers' office. Initially, Ms. Hewitt represented in a letter to Ms. Rogers dated April 7, 2006 that Ms. Barry had assured her that she was not involved in representing Mr. O'Rourke and that she did not know anything about the case. Ms. Barry's recollection of her involvement was in error, as evidenced by time sheets attached to Ms. Rogers' motion to disqualify. The time sheet entries show Ms. Barry worked 6.9 hours representing Mr. O'Rourke from February through July of 2004. Ms. Hewitt concedes that Ms. Barry "did have at least some degree of involvement" as evidenced by the time sheets.

In response to the motion to disqualify, Ms. Hewitt submitted Ms. Barry's affidavit which stated that she "never reviewed any correspondence or pleadings in the case, other than the Motion to Intervene and to lift seal referred to in Mr. O'Rourke's Motion to Disqualify; never signed any correspondence or pleadings in the case." Again, Ms. Barry's recollection was in error, as evidenced by correspondence and pleadings signed by Ms. Barry. While Ms. Barry clearly reviewed and signed pleadings in her representation of Mr. O'Rourke, the billing records do not reflect this participation.

After a hearing where Ms. Barry testified, the trial court found Ms. Hewitt was disqualified under Rule 1.10(d) of the Rules of Professional Conduct. Ms. O'Rourke appealed the order disqualifying Ms. Hewitt.

I. Standard of Review

The standard of review applicable when reviewing a trial court's ruling on vicarious disqualification of an attorney's firm is whether the trial court abused its discretion. *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001) "A trial court abuses its discretion whenever it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" *Clinard*, 46 S.W.3d at 182; *quoting State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The party "questioning the propriety of the representation" has the burden of proof. *State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003), *citing*, *Clinard*, 46 S.W.23d at 187, *State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000); *State v. Jones*, 726 S.W.2d 515, 520-21 (Tenn. 1987).

II. Analysis

As a preliminary matter, we should note that both parties apparently agree that Ms. Barry is disqualified from representing Ms. O'Rourke based on her participation with Ms. Rogers' firm. No one argues otherwise. The only question on appeal is whether Ms. Barry's disqualification is to be imputed to Ms. Hewitt.

Since all the relevant events in this matter transpired after March 1, 2003, the question of whether Ms. Hewitt should be disqualified is governed by the Supreme Court's Rules of Professional Conduct. Whether one attorney's disqualification is imputed to other attorneys in the firm is governed by Rule 1.10 of the Rules of Professional Conduct entitled "Imputed Disqualification." Rule 1.10 provides in pertinent part as follows:

> (c) Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may nonetheless represent the person if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:
> (1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and
> (2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by Rule 1.9(c); and
> (3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and
> (4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.
>
> (d) The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if
>
> (1) The disqualified lawyer was substantially involved in the representation of a former client; and
> (2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and
> (3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

Ms. Hewitt argues the notice and screening mechanisms that she put in place satisfy Rule 1.10(c) so that Ms. Barry's disqualification may not be imputed to her. Counsel for Mr. O'Rourke disagrees, arguing that the screening mechanisms were not promptly put into place.

Even if Ms. Hewitt implemented all the notice and screening mechanisms described in Rule 1.10(c) perfectly, she would nevertheless be disqualified if Rule 1.10(d) is applicable. For that reason we will first turn our attention to whether Ms. Hewitt is disqualified under Rule 1.10(d).

If the three conditions of Rule 1.10(d) are met, then any notices or screening are irrelevant to the determination whether Ms. Hewitt is disqualified by imputation. Comment (9) to Rule 1.10(d) gives the following guidance:

> (9) Paragraph (d) restates the rule of law established by *Clinard v. Blackwood*, 46 S.W.3d 177 (Tenn. 2001). In that case, the Tennessee Supreme Court held that screening mechanisms were generally not effective to avoid imputed disqualification of a law firm when a lawyer was perceived as "switching teams" in the course of pending litigation. Although the holding of *Clinard* was grounded in the prior standard from the Code of Professional Responsibility guarding against the "appearance of impropriety," *see* Canon 9, EC 9-6, the Court also noted that its holding was necessary to further lawyer-client communications and to avoid the impression that the judiciary favors considerations of lawyer mobility over those of client confidentiality. Consequently, the *Clinard* rule continues under the present Rules. As was the case in *Clinard*, this narrow exception to paragraph (c) will vicariously disqualify the law firm only when the interests of a client of that firm are presently and directly adverse with those of a person who was formerly represented in substantial part by the disqualified lawyer.

The decision in *Clinard*, rendered in 2001, concerned application of the Tennessee Code of Professional Responsibility then in effect. The court in *Clinard* noted that future revisions to the Code could yield a different result. 46 S.W.3d at 186 n.7. As evidenced by the above quoted comment, the *Clinard* decision's rationale survives the new Rules of Professional Conduct which became effective in 2003.

The Supreme Court in *Clinard* recognized that if there is an appearance of impropriety, then imputed disqualification may nevertheless be necessary "even when adequate screening measures have been employed" since it is "vitally important" to protect the image of the profession. *Clinard*, 46 S.W.3d at 186, *quoting* Formal Opinion 89-F-118 at *4. According to the Court in *Clinard*, "an attorney's avoidance of the appearance of impropriety is essential to the integrity of the legal profession." *Id*. at 186.

The Court in *Clinard* emphasized the necessity to avoid the appearance of impropriety to "promote public confidence in the legal system." *Id*. at 187. The standard to determine whether an appearance of impropriety exists is objective and should be determined "from the perspective of a reasonable lay person . . . deemed to have been informed of all the facts." *Id*. Even when screening procedures are used "effectively," there are occasions where "the taint of the appearance of impropriety can be purged only by disqualification." *Id*. at 187-88. When an attorney's involvement in the prior case is so extensive that his or her employment at the new firm could be "regarded as a changing of sides," then it is difficult to rebut this appearance of impropriety by screening mechanisms. *State v. Davis*, 141 S.W.3d 600, 613, (Tenn. 2004), *cert. den*., 543 U.S. 1156, 125 S.Ct. 1306 (2005), *citing Clinard*, 46 S.W.3d at 184-88.

The Court in *Clinard* used the term "appearance of impropriety" as a standard to determine whether disqualification was necessary. While Rule 1.10(d) does not use the term "appearance of impropriety," it is clear that if a situation meets the three conditions of Rule 1.10(d), whether one calls it an appearance of impropriety or not, then Rule 1.10(d) provides that screening and the techniques of Rule 1.10(c) do not remove the taint, and disqualification is required. The "rule of law" established in *Clinard*, *i.e.*, that there are certain circumstances when screening cannot avoid imputation to the firm of the new attorney's disqualification, is embodied in Rule 1.10(d) of the new Rules of Professional Conduct.

With an understanding that Rule 1.10(d) "restates" the rule of law established in *Clinard*, we now turn our attention to whether the three conditions of Rule 1.10(d) have been met such that an exception to Rule 1.10(c) exists, with the result that disqualification is required regardless of notice or screening mechanisms.

The real issue in this matter is whether the first condition of Rule 1.10(d)(1) is met, *i.e.*, whether Ms. Barry was "substantially involved" in the representation of Mr. O'Rourke while she was with Ms. Rogers' firm. It is not possible to accurately quantify Ms. Barry's involvement in her representation of Mr. O'Rourke since her recollection is clearly flawed. While her initial recollection was that she was not involved in Mr. O'Rourke's case, Mr. O'Rourke's attorney produced evidence showing that Ms. Barry billed Mr. O'Rourke's file for over six (6) hours of work. Ms. Barry then signed a sworn statement that she had not reviewed or signed correspondence or pleadings which also turned out to be incorrect. Ms. Barry clearly cannot recall the extent of her involvement. In any event, Ms. Barry was an attorney with Ms. Rogers' firm, and it is clear she participated in Mr. Rourke's representation.

While it is true that the proponent of the motion to disqualify has the burden of proof, we believe under the unique facts of this case that the trial court did not abuse its discretion in finding Ms. Hewitt was disqualified by implication. We know Ms. Barry worked on Mr. O'Rourke's case for at least 6.9 hours as evidenced by the billing records. We also know that the billing records do not accurately reflect the total amount of time Ms. Barry spent since her review and execution of pleadings is not reflected in the billing. Ms. Barry worked as Ms. Rogers' sole associate having access to Mr. O'Rourke's files and to Mr. O'Rourke personally during his frequent visits to Ms. Rogers' office.

In Mr. O'Rourke's statement to the trial court, Mr. O'Rourke explained that he had spent considerable time in Ms. Rogers' office, often visiting in the common areas, and considered Ms. Barry to be a part of his team. Ms. Rogers has a small office on a single floor, and he believed that when he was there he could speak freely about his ongoing disputes with his former wife around his attorney's employees and staff.

Hewitt and Barry is also a two attorney firm. In *Clinard*, the Court discussed the standard to be from the "perspective of a reasonable lay person . . . deemed to have been informed of all the facts." 46 S.W.3d at 187. While all the facts may not be available, this absence is occasioned by

Ms. Barry's flawed recollection.[1] Given the facts that we do know, we find the trial court did not err by finding that Ms. Barry was "substantially involved" in Mr. O'Rourke's representation.

The second condition of Rule 1.10(d) is met if the lawyer's representation of the former client was "directly adverse" to the interests of the firm's current client in connection with an adjudication proceeding. Ms. Barry was involved in Mr. O'Rourke's representation in the post-divorce proceedings which is directly adverse to the interests of Ms. O'Rourke. While the parties were divorced in 2001, there have been on-going disputes between them pertaining to their minor children resulting in orders entered in October of 2004 and November of 2005 and a court appointed parent coordinator to assist the parents in dealing with decisions affecting the children. The billings showed Ms. Barry worked on Mr. O'Rourke's case during the period in 2004 between February and July. Clearly, the O'Rourkes' interests remain "directly adverse." As for the third condition of Rule 1.10(d), these proceedings were still pending. While the specific problems may change, the post-divorce proceedings concerning the O'Rourkes' parenting arrangement remain open.

Under these circumstances, Ms. Barry could easily be seen by a layperson as "switching teams" during the game. We do not believe the trial court abused its discretion by imputing Ms. Barry's disqualification to Ms. Hewitt. The trial court is affirmed. Costs of this appeal are taxed to the appellant, Cydnie Browning O'Rourke.

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PATRICIA J. COTTRELL, JUDGE

[1] We do not intimate that we believe Ms. Barry acted in bad faith.